Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

JOHNNY GEOTES, D.V.M.,

Petitioner,

v.

MISSISSIPPI BOARD OF VETERINARY MEDICINE, STUART C. DENMAN, D.V.M., DAVID NEWELL, D.V.M., E. MACK HUDDLESTON, D.V.M., LOWELL ROGERS, D.V.M., JACK L. NUNNERY, D.V.M., INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE MISSISSIPPI BOARD OF VETERINARY MEDICINE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dr. Johnny Geotes, a Mississippi veterinarian, filed his federal court challenge to the composition and funding of the State Veterinary Board prior to the time that Board met to consider charges against Dr. Geotes. This Court should decide:

(1) Whether, and at what stage of the administrative proceedings, a federal court should dismiss, pursuant to *Younger* abstention, a § 1983 challenge to a state administrative board which is unconstitutionally funded in violation of *Tumey v. Ohio*, 273 U.S. 510 (1927)?

(2) Whether abstention is to be reviewed *de novo* rather than for abuse of discretion?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the Petition and is referenced in a Table of Decisions without reported opinions appearing in the Federal Reporter at 613 F.3d 1355 (5th Cir. 1998). The Opinion of the United States District Court appears at Appendix B to the Petition and is reported at 986 F.Supp. 1028 (S.D.Miss. 1997).

JURISDICTION

The date on which the United States Court of Appeals decided this case was November 13, 1998. A timely Petition for Rehearing was denied by the United States Court of Appeals on December 15, 1998. A copy of the Order denying rehearing appears at Appendix C.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and § 73-39-7, Miss. Code Ann. of 1972 (Supp. 1993):

> (1) There shall be no obligation on the part of the state for the payment of any money as salary or otherwise to any member of the board, but the compensation and expenses of said board shall be paid out of the fees and fines as hereinafter provided.

STATEMENT OF THE CASE

Mississippi's Veterinary Practice Law of 1946 provides that compensation for the disciplinary tribunal and expenses of the Veterinary Board are to be paid solely "out of fees and fines" levied by the Board. § 73-39-7(1), Miss. Code Ann. of 1972 (Supp. 1993). Dr. Johnny Geotes, a veterinarian subject to the Board, challenged this statute as being in violation of *Tumey v. Ohio*, 273 U.S. 510 (1927), and due process. Dr. Geotes filed his § 1983 complaint in the United States District Court on November 13, 1996.

The Veterinary Board met on November 15, 1996. Dr. Geotes appeared but declined to participate. By agreement, the proceedings before the Veterinary Board were

stayed. The parties presented cross-motions for preliminary injunction and for *Younger* dismissal[1] to the United States District Court. On February 28, 1997, with no ruling from the federal district court, the Veterinary Board *sua sponte* dissolved its voluntary stay and entered its order suspending Dr. Geotes' license. Thereafter, on May 13, 1997, the District Court entered its Memorandum Opinion and Order denying Plaintiff Dr. Geotes' Motion to Enjoin and Granting Defendants' Motion to Dismiss on Abstention Grounds. As the District Court reasoned:

> And because the Board has already acted in plaintiff's case, any violation of plaintiff's right to an unbiased decisionmaker 'in the first instance' is a ***fait accompli***; it can no longer be avoided, only remedied. This Court thus perceives no legitimate basis for enjoining further state proceedings.

986 F.Supp. 1028, 1035. The District Court also denied the Plaintiff's Motion to Stay rather than dismiss under abstention by its order of June 23, 1997. The District Court had waited six months from the filing of the complaint until the day on which it dismissed the action. The issues had been fully briefed in the federal court before the State Board acted. By waiting until the threatened action sought to be enjoined had passed, the District Court applied *Younger* abstention to avoid federal jurisdiction. Generalizing such a rule would allow a district court to abstain in every instance in which injunctive relief had been sought.

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[1] *Younger v. Harris*, 401 U.S. 37 (1970).

The Fifth Circuit affirmed without written opinion.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's decision below is in direct conflict with decisions from other Circuit Courts of Appeal as to whether an unconstitutionally constituted administrative board is an exception to *Younger* abstention and as to whether, and at what stage of the State's administrative proceedings, a federal court should invoke *Younger* abstention.

Debate in academic journals[2] and discussions from this Court, *e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712, 1720, 135 L.Ed.2d 1 (1996); *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), have supported abstention as the exception, not the rule. Generally, "the

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[2] Chemerinsky, Erwin, "Parity Reconsidered: Defining a Role for the Federal Judiciary," Volume 36, UCLA Law Review 233 (December 1988); Redish, Martin H., "Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights," Volume 36, UCLA Law Review 329 (December 1988); Chemerinsky, Erwin, "Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish," Volume 36, UCLA Law Review 369 (December 1988); and 112 Harvard Law Review 976, Note, *FEDERAL CIVIL PROCEDURE – SIXTH CIRCUIT HOLDS THAT FEDERAL COURT SHOULD ABSTAIN FROM DECIDING A NON PARTY'S FIRST AMENDMENT CHALLENGE TO A STATE COURT INJUNCTION. – Gottfried v. Medical Planning Services, Inc.*, 142 F.3d 326 (6th Cir. 1998) (February 1999).

federal courts should be open to litigants presenting constitutional claims." Chemerinsky, Erwin, "Federal Court, State Courts, and the Constitution: A Rejoinder to Professor Redish", Vol. 36, UCLA Law Review 369, 382 (1988).

Despite this general rule, Dr. Geotes has been denied a forum for his federal constitutional claims. He stands convicted in the State's quasi-criminal proceedings, but is an individual not "in custody" for habeas purposes. One exception to *Younger v. Harris* is recognized where the injury to be avoided is the proceeding that is itself being challenged, such as for a double jeopardy challenge, *Gilliam v. Foster*, 515 U.S. 1301, 116 S.Ct. 1, 132 L.Ed.2d 883 (1995), 75 F.3d 882 (4th Cir. 1996) (*en banc*). Bias creates one such exception. *Gibson v. Berryhill*, 411 U.S. 564 (1973). Dr. Geotes was subject to the challenged bias of the Veterinary Board, without an avenue for addressing that bias before being convicted. For such individuals, it is impossible to show invalidation of their convictions as a prerequisite to filing their § 1983 actions, a result described in this Court as "untoward." *Heck v. Humphrey*, 512 U.S. 477, 500, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (Souter, J., concurring).

Dr. Geotes could not raise his federal constitutional claims prior to the administrative hearing because the Veterinary Board had not promulgated rules (either procedural or substantive rules) and was not set up to entertain motions. *Mississippi Dept. of Human Services v. Baum*, ___So.2d___ (Miss. 1999), 1999 WL 110618 (Miss.) (Rules of civil procedure inapplicable to administrative proceedings). Further, appeals from administrative decisions in

Mississippi are on an "arbitrary and capricious" standard, not *de novo*. *Nelson v. Miss. State Board of Veterinary Medicine*, 662 So.2d 1058 (Miss. 1995). In such a situation, the Court of Appeals for the District of Columbia has held that *Younger* abstention cannot apply. *Bridges v. Kelly*, 84 F.3d 470 (D.C.Cir. 1996). This decision is in direct conflict with the Fifth Circuit's affirmance here below.

There are also conflicts among the circuits as to when, or if, a state prosecution is considered "pending" for abstention purposes.

The Second and Ninth Circuits have ruled that *Younger* abstention applies if and only if the state prosecution was pending at the time of *filing* the federal action. *Dubinka v. Judges of Superior Court of the State of California for the County of Los Angeles*, 23 F.3d 218, 223 (9th Cir. 1994); *Schlagler v. Phillips*, No. 98-6062, ___ F.3d ___, 1999 U.S. App. LEXIS 1120 (2d Cir. N.Y. Jan. 28, 1999) (Bad faith exception to *Younger* might apply if, prior to prosecution, the United States Supreme Court had conclusively determined that the statute was unconstitutional); *Hansel v. Town Court for the Town of Springfield, N.Y.*, 56 F.3d 391 (2d Cir. 1995). Other circuits have held that state proceedings can be enjoined if the federal case has advanced procedurally before significant events have occurred in the state proceedings. *E.g., American Constitutional Law Foundation v. Meyer*, 113 F.3d 1245 (10th Cir. 1997).

The Sixth Circuit has ruled that no state proceedings need be pending against the party who brings the federal action, *Gottfried v. Medical Planning Services, Inc.*, 142 F.3d

326 (6th Cir. 1998).[3] The Eleventh Circuit has held that no state action must be pending for abstention to apply, against a vigorous dissent that this Court has devised abstention only to avoid interference with ongoing state prosecution, *Pompey v. Broward County*, 95 F.3d 1543 (11th Cir. 1996).

The current confusion among the circuits grows out of allowing the lower courts to apply their own discretion as to when state interests are so important as to support abstention.

The Supreme Court should announce a consistent doctrine. This Court should preserve a federal forum for individuals filing federal constitutional claims, regardless of the region from which their claims arise.

II. There is a split in the circuits as to what standard of review applies to abstention.

The First, Third, Sixth, Ninth and Tenth Circuits hold that abstention should be reviewed under a *de novo* standard. *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633 (1st Cir. 1996); *O'Neill v. City of Philadelphia*, 32 F.3d 785, 790 (3d Cir. 1994), *cert. denied*, 514 U.S. 1015, 115 S.Ct. 1355, 131 L.Ed.2d 213 (1995) (plenary review of legal requirements of *Younger*, but discretion on its application); *Fieger v. Thomas*, 74 F.2d 740, 743 (6th Cir. 1996); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 (9th Cir. 1984); *Taylor v. Jaquez*, 126 F.3d 1294, 1296, *cert. denied*, 118 S.Ct. 187, 140 L.Ed.2d 317 (10th Cir. 1997), *but*

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[3] *Gottfried* is criticized as "both ill-defined and overbroad." Note, 112 Harvard Law Review, *supra* at 975.

see, Ramos v. Lamn, 639 F.2d 559, 564, n.4 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981) (abuse-of-discretion standard). The Second Fourth, Seventh, Eighth, Eleventh and Fifth Circuits hold that abstention is to be reviewed for abuse of discretion. *Bethphage Lutheran Services, Inc. v. Weicker*, 965 F.2d 1239, 1244 (2d Cir. 1992); *Martin Marietta Corp. v. Maryland Human Relations Comm'n*, 38 F.3d 1392, 1396 (4th Cir. 1994); *Alexander v. Ieyoub*, 62 F.3d 709, 712 (5th Cir. 1995) (abuse-of-discretion standard); *International College of Surgeons Etc., et al. v. City of Chicago*, 91 F.3d 981 (7th Cir. 1996), *rhr'g and suggestion for rhr'g denied, rev'd*, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997), *on remand*, 153 F.3d 356 (7th Cir. 1998), *but see, Trust & Inv. Advisors, Inc. v. Hogsett*, 43 F.3d 290, 294 (7th Cir. 1994) ("application of the *Younger* doctrine is absolute . . . "); *Night Clubs v. City of Fort Smith*, 163 F.3d 475 (8th Cir. 1998), *but see, Beavers v. Arkansas State Bd. of Dental Examiners*, 151 F.3d 838 (8th Cir. 1998) (The underlying legal questions, however, are subject to plenary review); *Old Republic Union Ins. Company v. Tillis Trucking Co., Inc.*, 124 F.2d 1258, *rhr'g and suggestion for rhr'g denied*, (11th Cir. 1997), 132 F.3d 1462, *cert. denied*, ___ U.S. ___, 118 S.Ct. 1363, 140 L.Ed.2d 513 (1998). In the case here presented, the abuse of discretion standard resulted in an adoption of the District Court's ruling without exercise of scrutiny with regard to the legal standard applied. On *de novo* review the decision below should have been reversed. Abstention should not bar Dr. Geotes from bringing his federal claims.

CONCLUSION

To render uniform the standard of review and to reconcile the divergent applications of abstention in the various circuits, this Court should review the Fifth Circuit's abstention from the constitutional challenge presented below.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 97-60506

JOHNNY GOETES, D.V.M.,

Plaintiff-Appellant,

VERSUS

MISSISSIPPI BOARD OF VETERINARY MEDICINE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:96-CV-834LN)

(Filed Nov. 13, 1998)

Before WISDOM, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed on the basis of its thorough opinion of May 13, 1997.

AFFIRMED.

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

Johnny GEOTES, D.V.M., Plaintiff

v.

MISSISSIPPI BOARD OF VETERINARY MEDICINE, Stuart C. Denman, D.V.M., Billie U. Flynn, D.V.M., E. Mack Huddleston, D.V.M., Lowell Rogers, D.V.M., Jack L. Nunnery, D.V.M., individually and in their official capacities as Members of the Mississippi Board of Veterinary Medicine Defendants.

No. CIV. A. 3:96CV834LN.

United States District Court,
S.D. Mississippi,
Jackson Division.

May 13, 1997.

Dennis L. Horn, Horn & Payne, Jackson, MS, for Plaintiff.

C. Michael Malski, Carnathan & Malski, Amory, MS, for Defendants.

MEMORANDUM OPINION AND ORDER

TOM S. LEE, Chief Judge.

Defendants Mississippi Board of Veterinary Medicine and its members filed in this cause a motion to dismiss pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure asserting that under the abstention principles set forth in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, this court must decline to exercise jurisdiction over this action.

Plaintiff Johnny Geotes, D.V.M., responded in opposition to defendants' motion and filed his own motion for preliminary injunction seeking to enjoin disciplinary proceedings against him over which the Board was presiding on the ground that the Board's proceedings are constitutionally flawed. While these motions were pending, the Board concluded its hearings and by order dated February 28, 1997, has revoked plaintiff's license to practice veterinary medicine and precluded his reapplication for licensure for a period of one year. The plaintiff has appealed the Board's order to the Harrison County Chancery Court, which has entered a stay of the Board's order until the appeal is resolved. This court has considered the motions of the parties in light of the Board's ruling and concludes, for reasons that follow, that the Board's motion to dismiss should be granted and plaintiff's motion for preliminary injunction should be denied.

By statute in Mississippi, the Board is authorized, inter alia, to "conduct investigations and hearings upon complaints calling for discipline of any licensee or applicant for license [to practice veterinary medicine in this state]." Miss.Code Ann. § 73-39-9. The Board is further granted "the right and power, [after a hearing], to revoke or suspend the license of a veterinarian . . . and [to] place said veterinarian . . . on prohibition conditioned on future good conduct and compliance with this chapter, and [to] impose an administrative fine not to exceed One Thousand Dollars ($1,000.00) for each such separate offense," for any of a variety of specified reasons. Miss.Code Ann. 73-39-17. Proclaiming its authority under these statutes, the Board notified the plaintiff by letter dated May 16, 1996 that a hearing would be held June 6, 1996 to address

"a possible violation of § 73-39-19(k) which permits the revocation or suspension of the license of a veterinarian for employing any person practicing veterinary medicine unlawfully with the knowledge of such illegal practice by said employee." The Board, it appears, had received a "complaint" from a former employee of Dr. Geotes, Kelly Buckmaster, who claimed that on occasions when the plaintiff was out of town, the "girls were running his clinic," performing such services as "diagnosing, putting animals under anesthesia and suturing them, [and] prescribing medications including controlled drugs such as testosterone and phenobarbital." According to Ms. Buckmaster, "the girls . . . [b]asically played vet with Dr. Geotes' blessing."

Prior to the date of the scheduled hearing, Ms. Buckmaster withdrew her complaint, and the Board informed plaintiff, through his counsel, that it was continuing the hearing "indefinitely." Thereafter, however, the Board advised plaintiff in an October 15, 1996 letter that additional complaints had been filed against him, regarding which a hearing would be held on October 25, 1996. The complaints which the Board had received, copies of which were transmitted to plaintiff's counsel, were from two employees of Dr. Geotes who asserted, as had Ms. Buckmaster, that Dr. Geotes has expected and required them, even though they were not licensed, to perform services that they felt constituted the practice of veterinary medicine. One of the complainants also claimed that she had witnessed controlled drugs being sold to clients and non-clients and that Dr. Geotes had provided her with prescription medicine that he knew was for her personal use.

The hearing originally scheduled for October 25 was rescheduled for November 15, 1996. But two days before the hearing, plaintiff filed this lawsuit under 42 U.S.C. § 1983 seeking an injunction against the Board's administrative proceedings and declaratory relief based on allegations that the Mississippi Veterinary Practice Law of 1946, Miss.Code Ann. § 73-31-1 et seq., on its face and as applied, is violative of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. More particularly, he complained that the procedures employed by the Board with respect to the proposed hearing and possible disciplinary action were insufficient because the Board had not promulgated regulations specifying the nature of misconduct that might warrant disciplinary action nor prescribed the penalty assessable for a given offense; had failed to promulgate and/or provide to Dr. Geotes rules for the conduct of its hearings; and had failed to provide plaintiff with adequate notice of the charges and evidence against him or to apprise him of the witnesses who were expected to testify at the hearing. He further complained that the members of the Board had a personal financial stake in the outcome of the charges against him because they receive their compensation from fees and fines imposed by the Board, and that therefore, they are not the disinterested and impartial decisionmakers guaranteed him by the Due Process Clause.

Though Dr. Geotes' counsel served the Board members with the complaint at the start of the hearing, the Board went forward with the hearing. However, after limited testimony, it continued the hearing to December 15, 1996. In the interim, the Board filed its motion to

dismiss and plaintiff responded with his motion for a preliminary injunction. The Board convened on December 16 for the scheduled hearing and while it offered plaintiff the opportunity at that time to present evidence relating to the allegations against him, plaintiff's counsel reiterated to the Board plaintiff's position that the proceedings against him were constitutionally flawed and on plaintiff's behalf, declined to participate further in the proceedings.[1] On February 28, 1997, the Board entered an order revoking Dr. Geotes' license. Dr. Geotes timely appealed the Board's ruling to the Harrison County Chancery Court, which has entered an order staying the ordered revocation pending appeal.

The Board's motion to dismiss this action is based on the doctrine established in *Younger v. Harris*, 401 U.S. 37,

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[1] Plaintiff's counsel specifically moved the Board members to recuse themselves because of "the funding legislation at issue that renders these proceedings unconstitutional." She also moved the Board to continue the action "pending any ruling from the U.S. District Court." The Board's attorney responded that though the Board "[might] well elect to hold any decision in abeyance until the Federal court rules," the Board preferred to take the motions under advisement and to have the plaintiff "go ahead with any evidentiary materials that [he] want[ed] to put on." Plaintiff declined to go forward, asserting that without more particular notice of the charges that he was supposed to be defending (i.e., without knowing what charges against him the Board was actually considering), under applicable Supreme Court authority, he ran the risk of incriminating himself with respect to (and hence being subject to discipline for) matters that the Board was not even then considering. Thereafter, in the same order by which it revoked Dr. Geotes' license, the Board denied his motion for recusal and his motion to continue the action pending a ruling by this court.

91 S.Ct. 746, 27 L.Ed.2d 669 (1971), which requires that the federal courts abstain from hearing claims for injunctive or declaratory relief "[when] assumption of jurisdiction . . . would interfere with pending state proceedings, whether of a criminal, civil, or even administrative character.' " *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1489 (5th Cir.1995) (quoting *Word of Faith World Outreach Center Church, Inc. v. Morales*, 986 F.2d 962, 966 (5th Cir.1993)), *cert. denied*, 515 U.S. 1145, 115 S.Ct. 2583, 132 L.Ed.2d 832 (1995).[2] The *Younger* abstention doctrine is based on notions of comity and federalism, and prohibits federal judicial interference with pending state judicial and state administrative proceedings of a judicial or quasi-judicial character where important state interests are involved and the plaintiff has or will have an opportunity to present his federal claims in the state proceedings. *Id. See also Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). To determine whether *Younger* abstention is appropriate, the Supreme Court has devised a three-part inquiry which asks (1) whether the judicial or judicial-in-nature state proceedings are ongoing; (2) whether the proceedings implicate important state interests; and (3) whether there

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[2] Though the *Younger* decision related to a state criminal prosecution, the principles enunciated therein were later extended to civil judicial proceedings, and then to administrative proceedings of a quasi-judicial or adjudicative nature. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (state administrative hearing of sex discrimination claim against school); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (attorney disciplinary proceeding).

is an adequate opportunity in the state proceeding to raise constitutional challenges. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). If each of these inquiries is answered in the affirmative, then the district court must dismiss the federal action and allow the state process to continue.

The first *Younger* criteria is satisfied here, for no one disputes that the importance of the state's interest in regulating the practice of veterinary medicine in this state, and assuring compliance by veterinarians with the state's laws and regulations relative to the proper practice of veterinary medicine. The second criteria is also met. Although the Board has now issued its ruling revoking plaintiff's license so that there are no proceedings currently pending against Dr. Geotes before the Board, in the court's opinion, the state proceedings are nevertheless properly considered ongoing for Younger abstention purposes in light of plaintiff's appeal of the Board's ruling to the chancery court. *See Independence Pub. Media of Philadelphia v. Pennsylvania Public Television Network Comm'n*, 813 F.Supp. 335 (E.D.Pa.1993); *cf. Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453, 456 (5th Cir.1987) ("The mere availability of state judicial review does not amount to the pendency of state judicial proceedings. . . . ").[3]

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[3] Had plaintiff merely had available to him but chosen not exercise his right to appeal the Board's order, then Thomas would dictate the conclusion that the proceeding was no longer ongoing. *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453, 456 (5th Cir.1987). *But see Alleghany Corp. v. Haase*, 708 F.Supp. 1507 (W.D.Wis.1989) (*Younger* abstention prevented consideration by federal court of plaintiff's § 1983 claims even

Moreover, it is manifest that plaintiff's objections relating to the Board's failure to promulgate regulations which adequately define punishable conduct, to deficiencies in the notice afforded him of the charges against him, and to the lack of information provided him regarding the Board's procedures and the rules governing the conduct of proceedings before the Board are all challenges which can be (and are being) presented to the chancery court. That is to say, plaintiff has "an adequate opportunity in the state proceeding to raise [these] constitutional challenges." *Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521. If these were the plaintiff's only claims, then, the court would conclude without difficulty that *Younger* mandated dismissal of this case. However, a determination of the proper disposition of the case in light of plaintiff's "bias" claim is less readily reached since the law is clear that the federal courts will not countenance, through *Younger* abstention, biased state proceedings.

Plaintiff's claim that Board members are biased due to a pecuniary interest in the proceedings against him derives from that part of Mississippi's Veterinary Practice Act which expressly provides that "[t]here [is] no obligation on the part of the state for the payment of any money as salary or otherwise to any member of the board." Rather,

> the compensation and expenses of said board shall be paid out of the fees and fines as hereinafter provided. The members of the board shall receive as compensation for their services

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though plaintiff declined to avail itself of state judicial review of agency action).

> the sum of Forty Dollars ($40.00) for each day in actual service of said board and, in addition, their expenses incident to the meeting of the board. If the fines and fees are not sufficient to defray such compensation and expenses they shall be prorated among the members of said board, after paying operating expenses of said board.

Miss.Code Ann. § 73-39-7. Plaintiff argues that in keeping with this funding scheme by which Board members receive their own pay if and only if there is enough received in fees and fines to defray their expenses, Board members have a pecuniary interest in the proceedings before them and therefore, the Board is not composed of independent and impartial decisionmakers. He submits, more specifically, that because they are paid for their services and expenses only if the fees and fines imposed and collected are sufficient to cover those costs, the defendant Board members have a direct, personal, substantial pecuniary interest in finding him to have committed a punishable offense and fining him for that offense.

It is a fundamental precept of due process that those responsible for decisions which affect an individual's property and/or liberty interests must be impartial.[4] It is

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[4] The Supreme Court has said:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a

further indubitably established that decisionmakers who have such a personal pecuniary interest in the outcome of proceedings affecting an individual's property or liberty interests as would likely cause them "not to hold the balance nice, clear and true between the accused and the State" do not qualify as impartial decisionmakers. *Tumey v. Ohio*, 273 U.S. 510, 532, 522, 47 S.Ct. 437, 444, 441, 71 L.Ed. 749 (1927) ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant . . . of due process of law to subject his liberty or property to the judgment of a court which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."). *See also Friedman v. Rogers*, 440 U.S. 1, 18, 99 S.Ct. 887, 898, 59 L.Ed.2d 100 (1978) (recognizing plaintiff/optometrist's constitutional right to a fair and impartial hearing in any disciplinary hearings conducted against him by State Optometry Board); *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) (due process requirement of fair trial in fair tribunal applies to administrative agencies as well as to courts); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) ("[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."); *Baran v. Port of Beaumont Navigation District of Jefferson County*, 57 F.3d 436, 444 (5th Cir.1995) (recognizing that decisionmaker's actual bias or probability of actual bias stemming from pecuniary interest violates due process guarantee).

> judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

It has thus been held that abstention in deference to a state court proceeding under *Younger* is inappropriate whenever the state tribunal, due to bias, is unable to adjudicate the case before it in keeping with the requirements of due process. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) (abstention inappropriate where state board which would try the case was "so biased by . . . pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of [the plaintiffs'] licenses to practice optometry"); *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60, 93 S.Ct. 80, 82-83, 34 L.Ed.2d 267 (1972) (finding due process violation where mayor/judge was responsible as mayor for the village finances and a major or substantial part of the village's income was derived from fines assessed by the judge/mayor); *Trust & Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 295 and n. 6 (7th Cir.1994). In that circumstance, the federal courts will not abstain even though the plaintiff would ultimately have in the state process the benefit of review – even de novo review – by a forum in which he could assert his constitutional claims. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61, 93 S.Ct. 80, 83-84, 34 L.Ed.2d 267 (1972) ("Nor . . . may the State's . . . procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication."); *see also Jaguar Cars v. Cottrell*, 896 F.Supp. 691, 696 (E.D.Ky.1995) (in light of Commission's "evident bias," judicial review of Commission's decision "would be an insufficient avenue for Jaguar to pursue its constitutional claims"); *Cronson v. Clark*, 645 F.Supp. 793, 796 (C.D.Ill.1986) ("hearings before a partial tribunal are

not constitutionally acceptable simply because the disadvantaged party has the opportunity to appeal").[5] In fact, not only will the federal court not abstain where the potential for bias is shown, but upon a finding that members of a state tribunal have a personal interest that might preclude their fair and impartial hearing of charges, it is appropriate for the federal court to enjoin the state proceedings against the plaintiff. *Friedman*, 440 U.S. at 18, 99 S.Ct. at 898; *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464 (injunction appropriate where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable").

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[5] Some cases have treated the existence of bias on the part of decisionmakers as an exception to the applicability of *Younger* – an "extraordinary circumstance" which removes a case from the *Younger* rule. *See Kugler v. Helfant*, 421 U.S. 117, 124-25 n. 4, 95 S.Ct. 1524, 1530-31 n. 4, 44 L.Ed.2d 15 (1975) (existence of biased tribunal is one of the "extraordinary circumstances alluded to in *Younger* where abstention is inappropriate even though all of the *Younger* elements have ostensibly been met"); *Jaguar Cars v. Cottrell*, 896 F.Supp. 691, 696 (E.D.Ky.1995) ("[T]he Commission's clear bias creates an extraordinary circumstance under which this Court may exercise jurisdiction over the matter."); *Independence Pub. Media of Philadelphia, Inc. v. Pennsylvania Public Television Network Comm'n*, 813 F.Supp. 335, 343 (E.D.Pa.1993) ("bias exception" is "a significant exception to the application of *Younger*"). Others have viewed it as implicating the third of the *Younger* criteria, holding that where the decisionmaker is biased, the affected party has no adequate opportunity to timely raise constitutional challenges. *See Yamaha Motor Corp. v. Riney*, 21 F.3d 793, 797 n. 10 (8th Cir.1994) ("an incompetent tribunal affects plaintiff's opportunity to litigate federal constitutional claims before a state tribunal").

Defendants in this case submit that there simply is no disqualifying potential for bias here because, despite their statutory authority, they have not imposed a fine against any veterinarian in at least fifteen years. They further submit that plaintiff's bias claim is moot in any event since the Board has already ruled and in ruling, did not fine Dr. Geotes. And they reiterate that plaintiff's remaining challenges to the Board's proceedings can be presented to and decided by the state court in the still ongoing proceedings. Accordingly, defendants maintain that this case must be dismissed under *Younger*. For his part, plaintiff acknowledges that the Board has ended its consideration of the complaints against him and though it found a violation, did not impose a fine against him (a fact which would belie a claim of actual bias). Plaintiff also acknowledges that since the Board has ruled, he is not currently involved in proceedings before the Board. He submits, though, that the state proceedings against him are not final, and that his claims are not moot because (1) he is currently continuing to operate his veterinary practice and, because of the Board's failure to promulgate regulations defining what conduct can subject him to disciplinary action, there is still the potential that the Board might choose to initiate renewed disciplinary proceedings for actions which he might take in his practice; and because (2) there is still the potential that he might be fined if the chancery court were to remand the case to the Board or if the Board were at some future time to initiate new proceedings against him. In light of the Board's ruling and the parties' positions in the wake of that ruling, the question thus arises whether the Board members' alleged bias might still provide a basis upon

which plaintiff might avoid *Younger* abstention and upon which this court might enjoin further state proceedings relating to the charges against Dr. Geotes. The court concludes that it does not.[6]

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[6] After the Board ruled, the Board's attorney apprised the court of that fact and subsequently submitted to the court an affidavit in which he asserted that in the fifteen years he has represented the Board, the Board has not imposed any fines. Plaintiff responded with his own affidavit in which he claims that eight to ten years ago, he was fined $500 by the Board for failing to timely fulfill continuing education requirements. Plaintiff now argues that even if the evidence did show that the Board has never imposed a fine, it still is statutorily authorized to do so and in the absence of an injunction, could at any time elect to invoke that authority. He reasons, therefore, that his claim is not moot even if the Board has a policy against imposing fines. While a policy or long-standing practice of not imposing fines might not have the effect of rendering the plaintiff's claim moot, it might well have the effect of rendering it meritless. If the assessment of a fine in a case would actually improve – even if only slightly – a Board member's financial position, then there would appear to be the potential for bias by the Board members that would disqualify them from deciding the case. *See Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir.1994) ("litigation before financially interested judges and jurors raises fundamental issues of due process, even when the judges' financial interest is relatively small"). However, if the proof were to establish that Board members have been fully remunerated for their expenses and the statutory fee to which they are entitled without resort to fine monies such that they stood to gain nothing from the imposition of fines, i.e., would not receive any personal or financial benefit, then it would necessarily follow that they had no sufficiently substantial interest to be disqualified from hearing the case on due process grounds. *See Rite Aid Corp. v. State Bd. of Pharmacy of N.J.*, 421 F.Supp. 1161, 1174 (D.N.J.1976); *cf. Alpha Epsilon Phi v. City of Berkeley*, No. C095-0562 SI, 1995 WL 761257, at *3 (N.D.Cal.1995) (members of Rent Stabilization Board lacked direct financial

It bears repeating that plaintiff's only claim which is potentially exempt from the *Younger* rule of abstention (or which fails to satisfy the *Younger* abstentia criteria)[7] is his bias claim, and that claim is premised solely on the Board's alleged predilection to impose fines so that the payment of their fees and expenses is assured. Consequently, if, as the Board argues, plaintiff's bias claim were moot since the Board did not fine plaintiff, then this court would be bound to dismiss the case based on *Younger* since no other claim which plaintiff has asserted would warrant or support federal interference with the state proceeding. However, in the court's opinion, even if plaintiff's bias claim did not become moot upon the Board's ruling in plaintiff's case, dismissal would still be in order.

Generally speaking, the "bias" exception to *Younger* is based on a recognition that while the federal courts ordinarily ought not interfere with ongoing state proceedings, the federal courts "need not defer under *Younger* to . . . [a state] agency crippled by pecuniary bias." *Independence Pub. Media of Philadelphia, Inc. v. Pennsylvania Public Television Network Comm'n*, 813 F.Supp. 335, 343 (E.D.Pa.1993). Indeed, the specific rationale upon which the Supreme Court has excepted due process charges of a biased state decisionmaker from the *Younger* rule of abstention and upon which the courts have relied to

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interest in outcome of hearing since hearing officer received a regular salary set by the City under its civil service system and Board members received a fixed stipend, unaffected by specific decisions of the Board).

[7] *See supra* page 1031.

enjoin state proceedings by potentially biased decision-makers, is that a party "is entitled to a neutral and detached magistrate in the first instance." *Ward*, 409 U.S. at 61-62, 93 S.Ct. at 83-84 (emphasis added). This is likewise what has prompted the Supreme Court to conclude that review by an unbiased state tribunal does not render the state's procedure constitutionally acceptable. *Id.; see also Yamaha Motor Corp. v. Riney*, 21 F.3d 793, 797 n. 10 (8th Cir.1994). In this vein, the court in *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 701 (7th Cir.1982), explained, in the context of a request to enjoin proceedings before a state commission on the basis of bias, that,

> [s]ubmission to a fatally biased decisionmaking process is in itself a constitutional injury sufficient to warrant injunctive relief, where irreparable injury will follow in the due course of events, even though the party charged is to be deprived of nothing until the completion of the proceedings. . . . [T]he precise violation . . . is the subjection to an unconstitutionally constituted decisionmaker. That injury has already occurred, and is therefore sufficiently "immediate" to warrant injunctive relief, . . . [and] judicial review of [the] biased state administrative proceedings, even if on a de novo basis, [does] not obviate the need for injunctive relief.

In this case, however, unlike any of the cases cited herein, the Board ruled in plaintiff's case before this court rendered a decision on the motions to dismiss and enjoin.[8] And because the Board has already acted in

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[8] The court notes that plaintiff did not move for a temporary restraining order but rather sought only a

plaintiff's case, any violation of plaintiff's right to an unbiased decisionmaker "in the first instance" is a *fait accompli*; it can no longer be avoided, only remedied. This court thus perceives no legitimate basis for enjoining further state proceedings.[9] Additionally, as there is nothing to prevent the plaintiff from now seeking his remedy from the state chancery court (by presenting his objections to the Board's proceedings to the chancery court), there is no longer a reason to suspend the Younger rule.[10] Or put another way, from the standpoint of a *Younger*

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preliminary injunction, and did not request of the court or indicate to the court that immediate or expedited consideration of the motion was needed, perhaps because plaintiff believed, albeit erroneously, that the Board had voluntarily suspended its proceedings.

[9] Of course, the court could conceivably enjoin the Board's order – but even that is not needed since the chancery court has already stayed the order for the pendency of plaintiff's appeal.

[10] Plaintiff argues that unless this court acts to enjoin the state proceedings, he remains potentially subject to being fined by the Board if the chancery court were to remand his case to the Board or if the Board were to commence disciplinary proceedings against him for actions which he might in the future take in his practice. This argument overlooks the fact that plaintiff is now in a state judicial forum – an unbiased forum – in which he can fully present and argue his constitutional claims, including his claim of Board bias. And while it is true, at least in this circuit, that "[a] person who contends that his constitutional rights have been violated by a state administrative proceeding is not required to resort to an appeal to state courts before seeking relief in a federal forum," *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453, 455 (5th Cir.1987), where a litigant does initiate state court review of a state administrative decision and that review is still pending, a federal action interferes with the state processes, and the policies on which *Younger* is based are implicated, *id.* at 457.

analysis, since the court at this time would be deferring to the chancery court and not to the allegedly biased Board,[11] the bias exception no longer pertains.

In summary, it is this court's opinion that as plaintiff has passed the point in the state proceedings at which he might have encountered bias, and as plaintiff now has ample opportunity to raise his constitutional concerns in state court, including his concern relating to the Board members' potential bias, intervention by the federal courts is no longer necessary nor, applying the *Younger* rationale, appropriate.[12] Accordingly, it is ordered that

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[11] There is no basis alleged by plaintiff for concluding that the Chancellor might harbor any bias that would preclude his fair adjudication of plaintiff's appeal.

[12] While "actual bias" is not required to invoke what the court will call the "bias exception" to *Younger*, that exception does not apply where there is a mere possibility of bias resulting from an insignificant or insubstantial pecuniary interest which could not logically be viewed as "offer[ing] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Ward*, 409 U.S. at 60, 93 S.Ct. at 83. That is not such a bias as would preclude a decisionmaker from constitutionally deciding the plaintiff's case. *Cf. Gibson*, 411 U.S. at 579, 93 S.Ct. at 1698 (board members' pecuniary interest had "sufficient substance" to disqualify them). Consequently, this court's initial inclination upon review and consideration of the parties' motions, i.e., before the Board had issued its ruling, was to direct the presentation of evidence relating to the bias issue since "the facts [were not] sufficiently developed to allow the court to make a realistic assessment of whether the potential for bias [was] sufficient to warrant a federal court to step in to protect the plaintiff's procedural due process rights." *Trust & Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 297 (7th Cir.1994)

plaintiff's motion to enjoin is denied and defendants' motion to dismiss is granted.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

(mere allegation of bias does not in and of itself render *Younger* abstention appropriate; "at least some findings are necessary before determining whether abstention is warranted"); *see also Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir.1994) (requiring proof of potential impact of claims so that court could "weigh intelligently the potential bias of Alaska judges and jurors [and] determine whether their alleged interest has 'sufficient substance to disqualify them,' "); *Torres Torres v. Hernandez Colon*, 656 F.Supp. 372, 378 (D.P.R.1987) (declining to enjoin state hearing where plaintiff failed to present convincing evidence that commissioners "were so tainted by pecuniary and political interests in his case that they were in fact violating his right to due process of law"); *Rite Aid Corp. v. Board of Pharmacy of State of N.J.*, 421 F.Supp. 1161, 1170 (D.N.J.1976) (requiring plaintiffs to present evidence to prove, "if they could, the existence of the required substantial pecuniary interest"). Since the court concludes that the plaintiff may present his bias claim to the state court, this court need not and does not decide plaintiff has demonstrated the requisite bias or whether more proof should be required of the parties. And although plaintiff professes concern over the possibility that the chancery court might remand his case to the Board, this court presumes that if the Chancellor were to find merit in plaintiff's assertion that the Board proceedings violate his due process rights, either because of bias or for some other reason, he would conclude that a remand to the Board was inappropriate.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-60506

JOHNNY GEOTES, D.V.M.

Plaintiff-Appellant

v.

MISSISSIPPI BOARD OF VETERINARY MEDICINE; STUART C DENMAN, D.V.M., individually and in his official capacity as member of the Mississippi Board of Veterinary Medicine; BILLIE U FLYNN, D.V.M., individually and in his official capacity as member of the Mississippi Board of Veterinary Medicine; E MACK HUDDLESTON, D.V.M., individually and in his official capacity as members [sic] Mississippi Board of Veterinary Medicine; LOWELL ROGERS, D.V.M., individually and in his official capacity as a member of the Mississippi Board of Veterinary Medicine; JACK L NUNNERY, D.V.M., individually and in his official capacity as a member of the Mississippi Board of Veterinary Medicine

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed Dec. 15, 1998)

(Opinion 11/13/98, 5 Cir., ___, ___ F.3d ___)

Before WISDOM, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not have in voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge